Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 107.

E. F. BLACK,
Appellant,
vs.
WALTER P. JACKSON,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

MOTION TO DISMISS APPEAL.

Comes now the said Walter P. Jackson by his attorney of record, and moves this Honorable Court to dismiss the appeal herein: *First*, because this Court has no jurisdiction of said appeal, the subject-matter of controversy being the right of the possession of a certain homestead in Oklahoma Territory, the title to which is still in the United States; *Secondly*, because there is no sufficient allegation in the

pleadings, nor any proof, showing the actual money value of said possession: and *Thirdly*, because the actual value of the land, with a clear and unclouded title, the possession of which is involved, is not of sufficient value to give this Court jurisdiction, nor is there anything involved in said appeal of which this Court can take jurisdiction.

FRED BEALL,
Attorney for Walter P. Jackson.

BRIEF IN SUPPORT OF ABOVE MOTION.

STATEMENT.

The statement of facts, as set out on pages 1 to 5 in the brief for appellant, is in the main correct, but not wholly so. The statement at the bottom of page 3 and top of page 4, that "the answer further alleges that it is the plaintiff's intention, as soon as he succeeds in dispossessing said defendant from said land, to relinquish his entry upon the same, and permit another to make entry thereof, for the purpose of depriving the defendant of the right upon the plaintiff's making final proof of bringing an action to charge him as trustee," etc., is not entirely correct.

The allegation in the answer is:

"Defendant further says that, if he is ejected from said land and his home and improvements thereon by order of this court, he verily *believes*. and so states the fact to be, that said plaintiff will relinquish to the Government of the United States, for a valuable consideration, all his claim to and interest in said land, and that the same will be entered as a homestead by some other person qualified to enter and hold the same and a stranger to the disqualification and wrongful acts of the plaintiff herein.

"That said land, with the improvements thereon by this defendant, *could be transferred, in the manner aforesaid, for the sum of $6,000.00.*"

The appellant filed, with his petition for appeal, the affidavit of his counsel, Mr. S. H. Harris, to the effect that he "knows the nature of said controversy therein, and that there is more than $5,000 involved in said appeal, exclusive of costs." Rec., 23.

Four other affidavits were filed with the clerk of the Supreme Court of Oklahoma, 20 days after the appeal had been allowed by the Chief Justice. Rec., 23–25.

These last affidavits are to the effect "That the relinquishment of the homestead entry upon said land, *and the right to file* a homestead entry thereon is well worth the sum of $6,000; that the actual amount in controversy in this action is the sum of $6,000."

The appellee has filed in this court the following affidavit:

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 351.

E. F. BLACK, *Appellant*,

vs.

WALTER P. JACKSON, *Appellee*.

Personally appeared before me, N. T. Smith, a notary public in and for Kay County, Oklahoma Territory, H. S.

Braucht, Charles C. Cuppy, W. A. Ellis, W. M. Ferguson, H. E. Farnsworth, Ove Harris, J. M. Haynes, Frank Pierce, Madison Pierce, E. W. Schafer, George I. Taylor, H. J. Welch, and Walter P. Jackson, each and all of whom are well and personally known to me to be reputable and credible citizens of said County and Territory, and each and all after being duly sworn by me, severally depose and say, each for himself, that he resides in, and is a permanent citizen of Kay County, Oklahoma Territory, that he is personally acquainted with the Southwest Quarter of Section Twenty-Six, Township Twenty-Eight, north of range two east, Indian Meridian, in said County and Territory, and knows the character of said land, the improvements thereon, and all the surroundings thereof, and that in his opinion the full value of said entire quarter section of land, with all the improvements thereon has not been at any time during the present year, of 1898, and is not now, greater than thirty-five hundred dollars, and at no time during the present year could said land have been sold for more than thirty-five hundred dollars in cash had the vendor been able to have conveyed the same by an absolutely perfect warranty title; and that in their opinion the west eighty acres, or west half of said quarter section, upon which the said E. F. Black resides, as set out in the original petition of said appellee, Walter P. Jackson, is not now, and has not been at any time during the present year of 1898 of greater value than seventeen hundred and fifty dollars, and could not with a perfect title have been sold for more than said last named sum at any time during the present year. And said affiants each and all further depose and say that the said H. J. Welch is the present Tax Assessor of Newkirk Township, County of Kay, and the said J. M. Haynes is the present Treasurer and Tax Collector of said County, and the said Frank Pierce is the present Sheriff of said County, and the said Madison Pierce is the present Deputy

Sheriff of said County, and the said Ove Harris is the present County Clerk of said County, and the said Walter P. Jackson is the appellee in said above styled cause.

H. S. BRAUCHT.
C. L. CUPPY.
W. A. ELLIS.
H. E. FARNSWORTH.
J. M. HAYNES,
Treasurer and Tax Collector.
H. J. WELCH,
Tax Assessor.
W. M. FERGUSON.
E. W. SCHAFER.
OVE HARRIS,
County Clerk.
W. F. PIERCE,
Sheriff.
MADISON PIERCE,
Deputy Sheriff.
GEORGE I. TAYLOR.

W. P. JACKSON,
Appellee.

Subscribed and sworn to before me this 4th day of October, 1898, in Kay County, Oklahoma Territory, and I certify that my commission as Notary Public will expire on the 21st day of February, 1899.

N. T. SMITH,
Notary Public. [SEAL.]

ARGUMENT.

The title to the land, the possession of one-half of which is involved in this controversy, is still in the United States. Of course the title cannot, so long as it remains vested in the United States, be the subject of jurisdiction of any court. The Land Department has the exclusive jurisdiction to determine, in the first instance, all questions as to the right to the title to the land. The Department has, in a contest between the parties to this suit, adjudged that Jackson has the first and ~~supreme~~ superior right to Black to make entry of the land, and accordingly can-

celled Black's entry thereon, and permitted Jackson to make entry. It yet remains for Jackson to show compliance with the homestead laws by continued residence, cultivation and improvement, which will entitle him under the law to a patent to said land, upon the payment of the price fixed thereon by Congress.

In order to make entry of said land Jackson was required to make affidavit as follows:

"That my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation," etc. 26 Stats., 1093.

The Land Department found in the contest between the parties, that Jackson did make a settlement in good faith on the land on September 16, 1893, and that he had followed up his settlement with residence on and cultivation and improvement of the land as required by law.

See decision of the Secretary of the Interior, Rec., 3 & 4.

As against that record, and the good faith of Jackson, the appellant set up in his answer to the petition of Jackson, that he *believed* that Jackson would for a valuable consideration relinquish his entry, and that some other person would enter the land. He does not aver that Jackson had threatened to relinquish, nor does he state any fact upon which his *belief* is based. He then avers that the land and appellant's improvements thereon "*could be transferred*" for $6,000 and there is the foundation for the jurisdiction of this Court.

Twelve creditable citizens of the County, including the Sheriff, a deputy sheriff, the Tax Assessor, and County Clerk, and the Tax Collector and Treasurer, made oath that they are "personally acquainted with the land, and know the character, the improvements thereon, and all the surroundings thereof," and that in their opinion the land could not

at any time during the year 1898 have been sold for more than $3,500 in cash, had the vendor been able to convey the same by an absolute perfect warranty title.

This Court said, in *Willis* vs. *Eastern Trust and Banking Company*, 167 U. S., 76, that it was true "that it had been stipulated that the value of the real estate exceeded $5,000, but the right to possession was the matter in dispute, and there is nothing in the record from which we conclude that the value of that reaches the jurisdictional amount."

So it is in the case at bar, even conceding the value of the land to be $6,000 there is nothing in the record by which can be determined the value of the naked possession of the land, during the time in which Jaekson has to make final proof and apply for patent.

But the full value of the land with all the improvements thereon is shown not to exceed $3,500.

The right asserted by Black is entirely speculative—its value cannot be calculated or determined by any known rule. He may die and it does not appear that he has any heirs; he may himself in many ways forfeit or lose his right to make a homestead entry before Jackson may relinquish his entry, if he contemplates such a course. At best Mr. Black can only claim an inchoate right, which he may in many ways forfeit and lose. His interest as alleged is too uncertain and contingent to give this Court jurisdiction of his appeal.

In *Huntington* vs. *Saunders*, 163 U. S., 319, this Court said:

> "The matter in controversy must have *actual value*, and that cannot be supplied by speculation on the possibility that if a discharge were refused, something might be made out of the bankrupt."
>
> South Carolina *vs.* Seymour, 153 U. S., 353, and cases therein cited.
>
> Dunham *vs.* Seymour, 161 U. S., 235.

The court below could not adjudicate any question relating to the title to the land involved in this suit, neither can this court. But in order to determine what the value of the asserted right of Black is, the court must first determine where the title is now vested, and that Black not only has the qualifications and the means of acquiring full title to the land from the United States, but that he will actually do so if not prevented by Jackson. A more contingent right could scarcely be imagined, or one to which it would be more difficult to fix a money value,

Respectfully submitted,

FRED BEALL,
Attorney for Motion.